
IN THE UTAH COURT OF APPEALS

LABOR COMMISSION, :
 :
 Appellant/Cross-Appellee, :
 : Case No. 20170734-CA
 vs. :
 :
 DEREK PRICE, :
 :
 Appellee/Cross-Appellant. :

CROSS-APPELLANT DEREK PRICE'S REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE SU CHON
CASE NO. 126918635

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ARGUMENT

The Labor Commission has acted in bad faith by seeking to enforce an invalid Judgment. This case is particularly suited for an award of fees under Utah Code Ann. § 78B-5-825. Prior to retaining counsel, Mr. Price spent countless hours trying to communicate with the Labor Commission and understand why he had judgments against him.¹ He was ignored.² Then, after retaining counsel, he spent a significant amount of money setting aside the invalid Judgment that should never have been enforced in the first place. Awarding fees in Mr. Price's favor is fair: Not only will he be able to recoup his expenses, an award of fees will deter the Labor Commission from enforcing dozens of judgments rendered invalid under *Heaps v. Nuriche, LLC*, 2015 UT 26, 345 P.3d 655.³

¹ See, e.g., Brief of Appellee / Cross-Appellant Derek Price, Statement of the Case, ¶¶ 19-27.

² See *id.*

³ From Mr. Price's counsel's search, it appears that there are numerous judgments against individuals (pre-*Heaps*) that the Labor Commission has sought to enforce (post-*Heaps*), for example, by filing motions for supplemental orders and applications for writs of garnishment. By way of example, in Case No. 126924729, the Labor Commission seeks enforcement of a judgment entered against Sebright West, Inc., and individual defendants Brent Sebright, Dave Sebright, and Gary Stein in July 2012 for failure to pay wages. At the request of the Labor Commission, a supplemental order was entered on September 21, 2018,

I. THE LABOR COMMISSION SOUGHT ENFORCEMENT OF AN INVALID JUDGMENT IN VIOLATION OF UTAH CODE ANN. § 34A-5-108(1)(b).

A. The Judgment Was Not Supported by “Existing Law” When the Labor Commission Sought Enforcement.

The Labor Commission had a statutory duty, prior to enforcement of the order, *i.e.*, garnishing Mr. Price’s wages, to make a “reasonable inquiry that the order [it seeks to enforce] is well grounded in fact and is warranted by existing law.” Utah Code Ann. § 34A-5-108(1)(b). The issue is narrow: Could the Labor Commission seek to garnish Mr. Price’s wages in good faith when it knew that the Utah Supreme Court had clearly held that individuals, such as Mr. Heaps, cannot be held liable for unpaid wages under the Utah Payment of Wages Act (UPWA)?⁴ The

requiring the appearance of Mr. Stein to answer questions under oath concerning his property. *See* Case Nos. 126900713, 126908333, 126909029, 126909199, 126911259, 126911260, 126914802, 126915655, 126919292, 126919804, 126921271 & 126921443. (These cases are just the beginning of a laundry list of cases where the Labor Commissions seeks to enforce invalid judgments against individuals.) The Court can take judicial notice of these public records. *Fitzgerald v. Critchfield*, 744 P.2d 301, 305 (Utah Ct. App. 1987) (taking judicial notice on appeal for the first time a bankruptcy discharge); *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (a court may take judicial notice of public records).

⁴ The Labor Commission has never disputed that it was aware of the *Heaps* decision. (In its Memorandum Decision and Order, the district court speculated that it was possible that the Labor Commission had

answer is no. It was incumbent on the Labor Commission to make sure that “existing law” supported the validity of the Judgment.⁵

The Labor Commission does not disagree that, based on the holding in *Heaps v. Nuriche, LLC*, 2015 UT 26, 345 P.3d 655, a manager of a limited liability company is not liable for unpaid wages under the UPWA. Nevertheless, it is undisputable that the Labor Commission, armed with knowledge of the *Heaps* decision, pressed ahead to enforce the plainly invalid judgment it had obtained against Mr. Price years earlier (based on its own erroneous reading of the UPWA). Because the Labor Commission knew its Judgment was invalid, and attempted to enforce it anyway, the Labor Commission failed in its statutory duty found in Utah

relied on the advice of counsel prior to enforcing the Judgment, *see* R. 305, but the Labor Commission did not make this argument.)

In addition, there is record evidence that the Labor Commission knew of *Heaps*. The former Director of the Utah Anti-Discrimination and Labor Division (UALD), who directed the Wage Claim Unit to process and adjudicate claims filed under the UPWA, signed a declaration for the benefit of the plaintiffs, Ron Heaps and Phillip Sykes, in the *Heaps v. Nuriche, LLC* case. Declaration of Heather Gunnarson, R. 115-16 (explaining that it had been the UALD’s understanding that the definition of “employer” under the UPWA provides for personal liability for individual agents and officers).

⁵ While this may seem onerous every time the Labor Commission seeks to enforce an order in its favor, the legislature has imposed this obligation on the Commission. The language of the statute is clear and unambiguous. *See* Utah Code Ann. § 34A-5-108(1)(b).

Code Ann. § 34A-5-108(1)(b), which failure was, at a minimum, in bad faith.

B. *Heaps Is Retroactive and the Judgment Is Invalid Under “Existing Law.”*

Even if it is necessary to analyze whether *Heaps* is retroactive (in order to determine that the Judgment is valid and supported by “existing law”), Utah law on the issue of retroactivity is clear. Any conclusion by the Labor Commission that *Heaps* does not apply to its enforcement of the Judgment is entirely unsupported in law.

The Labor Commission’s argument that *Heaps* does not apply retroactively is not well-taken. In its Opening Brief, the Labor Commission declined to address the issue, stating that because *res judicata* applies, the Court does not need to determine whether *Heaps* is retroactive. Opening Brief, p. 11.

The Labor Commission chose to address the issue, however, in its Reply. In its one-sentence argument, the Labor Commission argues that “new precedents are applied retroactively only to ongoing actions.” See Reply, p. 7 (citing *Heartwood Home Health & Hospices LLC v. Rita Huber*, 2016 UT App 183, ¶¶ 5, 10-12, 382 P.3d 1074). But *Heartwood*, cited by the Labor Commission, actually supports Mr. Price’s position.

The Utah Court of Appeals explained that “[t]he general rule of retroactivity is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively.” *Id.* ¶ 10 (citing *Monarrez v. Utah Dept. of Transp.*, 2016 UT 10, ¶ 28, 368 P.3d 846).

The more narrow issue in *Heartland*, however, was whether such a change in the law would apply when the case is on appeal – *i.e.*, when the change in the law occurred after an adjudication before the district court and after the appeal had been taken. *Id.* The Court analyzed this issue and ultimately concluded that there was “no law [cited by *Heartland*] contradicting the general rule favoring retroactivity.” *Id.* ¶ 12. Further, like the circumstances here, *Heartland* did not meaningfully challenge why retroactivity does not apply. *Id.*

Finally, even if the Labor Commission was correct that “new precedents are applied retroactively only to ongoing actions” (which it is not), the Labor Commission overlooks that its enforcement action against Mr. Price is, in fact, ongoing. *Heaps* has stood as binding precedent since before the Labor Commission initiated the enforcement action (*i.e.*, since before it obtained its writ of garnishment), and has remained binding

precedent throughout the district court's proceedings and throughout this appeal.

To hold otherwise would be unjust. The Utah Supreme Court explained that the Labor Commission's interpretation of the UPWA (which was advanced by the plaintiffs in the *Heaps* case) "would lead to absurd results." *Heaps*, 2015 UT 26, ¶¶ 19, 21. Although the Labor Commission's construction of the UPWA was "absurd," the Labor Commission believes that it can enforce whatever judgments it obtained under the wire of *Heaps* and initiate new enforcement actions in the wake of that decision. Allowing the Labor Commission to enforce invalid judgments would lead to the absurd result of an alleged manager paying the wage debt of its former employer, when that manager has absolutely no liability for such wages under the UPWA. Thus, an award of fees in this case is necessary not only to compensate Mr. Price for having to defend against the Labor Commission's "absurd" tactics, but to deter the Labor Commission from engaging in such tactics against others in the future.

II. THE FACTS SUPPORT AN AWARD OF FEES.

The Labor Commission points to the district court's ruling that there was an insufficient basis to demonstrate bad faith because the Commission could have "proceeded in this matter 'based on a prior interpretation of the law and believed in good faith that its counsel told them it would not be retroactive, it would not be bad faith.'" Reply, pp. 8-9 (citing R. 305). Further, according to the district court and the Labor Commission: "the facts are insufficient to determine that bad faith has occurred at this juncture." *Id.* at p. 9 (citing R. 305).

The facts are more than sufficient to support an award of attorney fees and the district court's decision declining to award fees should be reversed. Parties are not excused from the meritless positions they take or their litigation tactics, because of their "good faith" reliance on the advice of counsel. *See, e.g., LD III LLC v. Davis*, 2016 UT App 206, ¶ 22, 385 P.3d 689 (rejecting the argument that LD III's contempt was defensible because it said it relied on the advice of counsel); *Salt Lake County v. Hutchison*, 329 P.2d 657, 658 (Utah 1958) (a violation of a zoning ordinance could not be excused because the party claimed it relied

on the advice of counsel).⁶ The Labor Commission, charged with serving the people of the state of Utah, should not receive any preferential treatment.

The Labor Commission must ensure that the orders it seeks to enforce are grounded in fact and warranted by existing law. Utah Code Ann. § 34A-5-108(1)(b). After the Utah Supreme Court's decision in *Heaps*, the Labor Commission should have ceased its efforts to collect on the Judgment against Mr. Price, knowing that it had taken an erroneous reading of the Utah Payment of Wages Act. Instead, with full knowledge of the meaning and import of *Heaps*, the Labor Commission went full-steam ahead to enforce its invalid Judgment.

At the February 17, 2017 hearing on Mr. Price's objection to the writ of garnishment (before he retained counsel), the Labor Commission, knowing the import of *Heaps*, stood silent and did not disclose the controlling *Heaps* decision. After the hearing, where the district court imposed a 30-day stay of the writ so that Mr. Price could try and correct

⁶ Moreover, the district court's suggestion that the Labor Commission acted in good faith because it relied on the advice of counsel could only be established by the production of privileged attorney-client communications. The Labor Commission has not provided these communications.

the issues with the Labor Commission, Mr. Price made several attempts to discuss the matter with someone at the Labor Commission. When Mr. Price was finally able to get the attention of the Labor Commission's representative, he was told that his efforts had "ruined [the representative's] day"; that the Labor Commission didn't have time to "waste" to get the issue fixed; and that the time to respond to its wage claim had passed (even though it never provided actual notice of this wage claim to Mr. Price). R. 146-147.

The Labor Commission had another opportunity to correct its error when Mr. Price filed his Motion to Vacate, which outlined why the Labor Commission's Judgment was void and contrary to Utah law. Instead, in an apparent attempt to avoid the district court's consideration of Mr. Price's Motion to Vacate, the Labor Commission filed a proposed Order Re Garnishment, *see* R. 132-135, in an attempt to get a quick ruling on the application for writ of garnishment (without considering the merits of the Motion to Vacate).⁷

⁷ The filing of this proposed Order invited district court error and, in fact, resulted in district court error when the court signed the order. R. 283-286. Fortunately, the district court's subsequent Memorandum Decision and Order superseded and mooted the Order Re Garnishment.

The Labor Commission says in its Reply that it was not bad faith to retain the funds that were garnished (Mr. Price's property), because as the district court noted, the Labor Commission does not have that money. Instead, "it had already sent the money to the wage claimant." Reply, p. 11 (citing R. 304-05). There is no record evidence that the money was sent to the wage claimant Mr. Cummings, however, but even if there was, the district court should have required the return of the wrongfully garnished funds. The Labor Commission should have returned the monies garnished to Mr. Price even if it meant writing a check that would be drawn from the Labor Commission's bank account, irrespective of whether these funds are "traceable" to the exact funds garnished from Mr. Price's employer.

CONCLUSION

The Court should reverse the district court's decision denying fees because the Labor Commission acted in bad faith when it knowingly attempted to enforce a void and invalid Judgment. The Court should order that Derek Price is entitled to an award of his attorney fees under Utah Code Ann. § 78B-5-825, and remand the case to determine the amount of the fees award.

DATED this 21st day of November, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief contains 2,685 words, based on the word count of the word processing system used to prepare this brief, exclusive of table of contents, table of authorities, and any addendum containing statutes, rules, regulations or portions of the record, and therefore complies with the type-volume limitation provided in Rule 24(g), Utah Rules of Appellate Procedure.

DATED this 21st day of November, 2018.

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